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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 1055

G. F. HOWARD, PETITIONER,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, RESPONDENT.

MOTION FOR REHEARING.

G. F. HOWARD, *Pro Se*,
Oberlin, Kansas.

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Comes now the petitioner, G. F. Howard, in the above entitled cause and respectfully requests the Court to reconsider petitioner's request for a writ of certiorari which was denied April 23rd, 1945, for the following reasons, to-wit:

R. 86, par. 1, R. 87, par. 3 to 8. On February 17, 1945, petitioner forwarded the following assignment of errors, part of which was omitted in the printed record, i. e.

1. Under Trenies v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 60, par. 12, 13, i. e. Conclusions of a court of

general jurisdiction are assailable for fraud or lack of jurisdiction.

2. The Trial Court was biased against plaintiff Howard and biased in favor of the defendant. A trial by a biased Judge is not in conformity with "due process of law." National L. R. Board v. Ford, 114 F. 2d 905, par. 1, 301 U. S. 292, 294, 57 S. Ct. 724, 81 L. Ed. 1093.

3. The Court erred in striking from the record on or about Nov. 15, 1943, plaintiff's Exhibits B, C, D, F and G on motion of defendant, R. 60-61 and R. 83. Exhibit B contained L. E. Caldwell's deposition of July 30, 1934, pp. 34 to 41; J. H. Aydelott's deposition, p. 30; J. P. Noble's letter, p. 57—Rule 26 (2) and (3), i. e. Deposition may be used if (1) that witness is dead (L. E. Caldwell is dead), (2) that the witness is farther than 100 miles from place of trial (J. H. Aydelott is farther than 100 miles, J. P. Noble farther than 100 miles).

Rule 43 (a), In any case the statute or rule which favors the reception of the evidence governs and shall be presented according to the most convenient method prescribed in any statute or rule to which reference is made. See Lovell M. Co. v. Bindrim, (2d C. 191 4) 219 F. 533, 135 C. C. A. 283.

4. May 5, 1944, plaintiff subpoenaed C. S. Risdon of Red Oak, Iowa, and F. A. Arnold of Hamburg, Iowa, members of the general committee (Pet. of certiorari, p. 6, par. 1).

Risdon sent a doctor's certificate, but kept the $6.80, fee and mileage.

Arnold appeared at 9 A. M., May 22, date of trial. He remained until noon, but was not placed on the witness stand, neither would my lawyer say whether he would be. Arnold went home at noon and did not return. Court adjourned at noon, May 22, R. 37, fol. 38, Pet. for Cert., p. 9, par. (d). The hearing was of five hours duration; Plaintiff Howard was the only witness.

The above witnesses were in a position to testify that plaintiff was dismissed for reasons other than assigned by the employer.

5. R. 61 (fol. 62), Motion for new trial and Exhibit "A" and "B". R. 60, R. 65 and R. 86, fol. 93. Exhibit "A" as filed June 10, 1944, reads as follows: Plaintiff moves the court to make this a part of the record.

Omaha Nebr. May 24, 1944 to Thos. J. Sheehan Jr. I furnished you copies of depositions I wanted filed ten days in advance of the trial as well as much other evidence, which was not presented to the court. The supposed certified record filed by defendant, which was supposed to be the record filed in Award 606 is not a complete copy, Plaintiff's submission, or a material part thereof has been omitted. There was no opportunity to examine the record in court. If you are representing me in good faith, I demand this case be reopened and I be permitted to introduce my competent evidence. And, that the case be tried, and handled to a conclusion under the "Jurisdiction of the Court" as entered upon plaintiff's Amended Complaint, and not under State or General law.

As stated by the Supreme Court in Order of Railroad Telegraphers v. Railway E. Agency, 64 S. Ct. 586, cases under the National L. R. Act also apply under the Railway Labor Act.

No cases be cited as authority in any briefs that may be filed, except cases under the above two Acts and Interstate Commerce Acts.

No state decisions apply in this case.

Signed, G. F. Howard.

I hereby agree to comply with the above.

Signed, Thomas J. Sheehan, Jr.

May 26, 1944.

(Mailed Special Delivery 9 A. M. May 25, 1944.)

6. Defendant's Brief in the Eighth Circuit, Cause No. 12934, i. e. Findings of trial court are presumptively correct, and where the record does not contain all the evidence upon which findings of fact were based the findings will not be questioned on review, R. 43 (fol. 44).

No jury having been demanded. Rule 52 (b) When findings of fact are made in actions tried by the court with-

out a jury, the question of the sufficiency of evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

6(a). DEFENDANT'S BRIEF, PAGE 9, F. EIGHTH CIRCUIT, i. e.

An employee is not entitled to the equitable remedy of specific performance of his contract of employment in the Courts. And page 9 F-1.

Plaintiff's cause of action is controlled by the common law or state law applicable to his contract or employment.

(b) The Railway Labor Act of 1934, Section 2, Eighth, and Section 2, Tenth, i. e. The willful failure of any carrier, its officers, or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraphs of this section shall be a misdemeanor, and upon conviction thereof the carrier or agent offending shall be subject to a fine of $1,000 to $20,000, or imprisonment, etc. See American Fed. of Labor v. National L. R. Board, 60 S. Ct. 301, par. 1, i. e.

(c) The Court of Appeals for the Dist. of Columbia, like the several Circuit Courts of Appeal, is without jurisdiction over original suits conferred on District Courts, Jud. Code Sec. 24, U. S. C. A. Sec. 41, and Smith v. O'Grady, 61 S. Ct. 572, par. 1. The Federal Constitution is the "supreme law of the land" and the obligation to guard and enforce every right secured by that constitution rests on the state courts equally with the federal courts.

(d) The above Constitution and laws were in effect October 13-15, 1936, when plaintiff's case was tried by a state court over defendant's motion to dismiss on the grounds that the court was without jurisdiction. A Constitutional right was involved on October 13, 15, 1936.

7. QUESTIONS PRESENTED FOR THE COURT'S DECISION:

Has a lawyer the right under Rule 16 Pre-Trial Procedure, to bind his client in any way to deprive the client

of his constitutional or statutory rights? There is no question but what the case was tried under state law by consent of the attorneys *without plaintiff's knowledge or consent.* Sheehan knew nothing whatever about the case or the evidence, as he did not discuss the case with plaintiff; all he knew about the case, if he knew anything, was obtained from the defendant in the case, R. 37 (fol. 37).

8. Rule 16, par. 6, provides the court shall make an order which recites the action taken at the conference, the amendments to the pleadings, and agreements made by the parties as to any of the matters considered, and limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

8a. NO ORDER WAS FILED WITH THE RECORD IN THE CASE, AS PLAINTIFF EXAMINED THE RECORD EVERY FEW DAYS. IN ADDITION TO THIS, I ADDRESSED A LETTER TO THE CLERK OF THE COURT SOMETIME LATER INQUIRING ABOUT A PRE-TRIAL HEARING; THE CLERK REPLIED THAT THERE WAS NOTHING IN THE RECORD OF IT.

9. There is no regular court reporter in the District Court at Omaha. The case was first set for April 28, 1944. Mr. Sheehan called Gordon Harmon at 9 A. M., April 28, to be in court as my stenographer at 9:30 A. M. that day. We all reported at 9:30 A. M. at the court room and in a few minutes we were notified that the case had not been set. I received a letter (joint with all attorneys in the case) on April 24, 1944, that the case was set for 9:30 A. M. April 28, 1944. It was later set for May 10, then changed to May 22, 1944.

a. After the case was heard May 22nd and 23rd, 1944, I called on the reporter that took the testimony, supposed he was my employee in the case, and I was notified that he had been employed by the defendant, and should I desire a copy of the testimony, it would require a court order. I never did get a copy, neither would defendant permit me to read a copy. This, I believe, should be investigated.

10. R. 60, par. 2. June 10th, there was a half-hour hearing, plaintiff filed his Exhibit No. 12 in Cause No. 461, District Court, and in the Eighth Circuit, and plaintiff moves the Court for permission to make Exhibit No. 12 a part of this proceedings. Plaintiff was dismissed for union activities as designated in this exhibit.

11. Exhibit "L" filed in the District Court October 23, 1944, and in the Eighth Circuit about January 2, 1945. Plaintiff moves the Court to make this a part of the record in the above cause. Plaintiff was not permitted to file any evidence on the appeal to the Eighth Circuit; as a matter of fact, plaintiff had no voice in the handling. This was a plain case of coercion and intimidation and conflicts with Title 18, Section 51, of the U. S. Code.

Respectfully submitted,

G. F. HOWARD, *Petitioner*,
Oberlin, Kansas.

April 28, 1945.

This is to Certify that I, George F. Howard, have not presented this Petition for Rehearing for any purpose of delay whatsoever, but solely for the reason of calling this court's attention to the matters above set forth, and honestly believing has inadvertently overlooked or misconstrued such matters.

G. F. HOWARD.

EXHIBIT 12, FILED JUNE 10, 1944.

STATEMENT OF FACTS BY G. F. HOWARD.

Plaintiff Howard was dismissed for the same reasons stated in Order Railroad Telegraphers v. Railway Express Agency, 64 S. Ct. 586.

From shortly after world war one up to the time Plaintiff Howard was dismissed shipment of horses from Oberlin, Kansas to Strasburg, Pennsylvania was being made each year.

The Trade Agreement for handling Express by rail agents was ten per cent. Plaintiff Howard had a claim pending since prior to 1928 and since that date, for the difference allowed by the Express Company ($5.00 per car) and the Trade Agreement of ten per cent.

Express charges on a carload, Oberlin to Pennsylvania was $720.00 per car. Agent Howard should been paid $72.00 per car on each shipment, instead the Railway Express Company allowed Agent Howard $5.00 per car and threatened his dismissal if he deducted in excess of $5.00 per car.

IN APRIL, OR ABOUT THAT MONTH, 1931

Plaintiff Howard published in the Railway Telegrapher, the following article:

NOTICE TO COMMISSION EXPRESS AGENTS

TO THE RAILROAD TELEGRAPHER,

APRIL 24th, 1931.

FOR PUBLICATION IN THE TELEGRAPHER.

The March, 1930 issue of the Telegrapher carried an item to all agents working on commission for the Express Company.

SIGN NO INDIVIDUAL CONTRACTS WITH THE EXPRESS COMPANY: If you are asked to sign a contract or working rules and regulations, notify the party making such a request, that you have a committee to represent you with the Company for the purpose of establishing working Rules and Regulations.

On April 24, 1931, Plaintiff Howard submitted the following to the Local Chairman Enlow, to be published in the Telegrapher. It was published a month or two later in the Telegrapher.

I would like to call your attention to the notation by the Route Agent (Traveling Auditor), when he checks your station, at the bottom of his audit sheet wherein he places the following notation, i. e.

Rate of commission ten per cent line and rail, Air five per cent, carload five dollars per car, etc.

This is nothing but an agreement, and they are trying to reduce your commission from ten per cent, to five per cent, in ten years, no telling, seventy-five per cent of the Express will be traveling by air, and all those that sign this agreement will be handling and doing the same work they are now doing, except instead of receiving ten per cent, they will be receiving five per cent.

When the check is made of your station, you should refuse to sign any such statement or agreement, you do not have to sign it.

Another thing, New York are sending their waybills (95%) of them out "blank" receiving office is required to fully make out the waybill.

If New York can send their waybills out blank, why can't we?

In the writer's opinion, this is for the sole purpose of saving money and, cutting off a few extra men that should write those waybills out and place them on the package the same as all other offices.

All waybills that are sent out that way, commission agents should demand an additional five per cent for making the waybill for both ends of the line.

I would like to hear from others.

(Signed) CERTIFICATE No. 129.

P. S. When Plaintiff Howard sent this for publication, I of course was of the opinion that the Order of Railroad

Telegraphers on the C. B. & Q. R. Co. was a bona fide Labor Organization. I did not find out, that it was a Company Dominated Union, until after I was dismissed and called upon them for assistance in the handling of my case. Certificate No. 129 was Plaintiff Howard's membership number. For definition of Company Union, See Pennsylvania G. H. Lines, 303 U. S. 261 and 272, which is a bar to true collective bargaining

EXHIBIT L.

Omaha, Nebr. October 23, 1944.

Miss. Mary A. Mullen, Clerk District Court of the United States, City.

Dear Madam: Your letter October 20th. that certified copies may be had. In answer, I beg to advise that I will submit what I would like certified to the Eighth Circuit Court as a supplemental submission, which does not take the place of what has been submitted but simply adds to it.

Due to the fact that M. L. Donovan secured my signature to an agreement (July 18, 1944) to permit he and J. C. Mullen to handle the case, then did not handle according to agreement did not deprive me of my rights in the case, and I am not bound by such an agreement in the face of Supreme Court ruling under Pirie v. Tvedt, 115 U. S. 43, which reads, i. e. Plaintiff is entitled to prosecute his own case to a final determination in his own way.

Copy of Letter Addressed to M. L. Donovan, July 31, 1944 (Special delivery).

I do not want my case handled on any other than as provided by my Amended Complaint, and as was agreed upon before I employed you.

The Kansas court did not have jurisdiction of the case. District Court of the United States under the Judiciary Act 28 U. S. C. Sec. 41 (8) and (22), has exclusive jurisdiction, the Board has jurisdiction under the Railway Labor Act.

From what you said this morning, you now contend that the Kansas court did have jurisdiction, etc.

I did not employ you under those terms, and I made it very plain how I wanted the case handled, and my

amended complaint is plain enough to designate how I wanted it handled, and the case can not be won on any other terms, that is a foregone conclusion.

Do not undertake to handle it otherwise.

Signed, G. F. Howard.

I followed the above with a similar letter addressed to both the lawyers on Aug. 5, and 15th (special delivery), and I requested Donovan to sign a withdrawal from the case on August 3, and a number of times thereafter, which he refused to do, unless I would sign an agreement to permit him to retain the $500.00 I paid for the handling of the case, and I was repeatedly threatened by suit unless I permitted the lawyers to proceed with the case.

The only reason I permitted their Brief to be used was the Lino Slug Printing Company refused to print my own brief, which was only twenty pages, and the Insurance Companies refused to give a surety bond for $250.00, all goes to show, or appears that there was a general conspiracy to prevent me from appealing this case, and I was given to understand should I file any evidence that the defendant would file sufficient evidence to run the print bill up to $1,000.00.

Under McNulty v. National Mediation Board, 18 F. Supp. 505 — if coercion has been threatened upon the employee by anyone, party to the suit, such coercion, if proved, would defeat equitable relief to such party, and at p. 506, i. e. The Railway company must also enter the court with clean hands before it can invoke the court's equity powers to restrain another, no matter how inequitable that other's conduct may have been.

Everything points to the fact that the Labor Organization has a hand in the case, which is a "dominated union" and they do not like to be exposed.

In case you will not certify what I want filed, I will then file a motion with the Eighth Circuit and see what they will do, if anything. In case nothing can be done, I will ask the Senate Judiciary Committee to eliminate that part of Rule 1 which reads: Federal Rules shall be con-

strued to secure the just, speedy, and inexpensive determination of every action, my attorney fees since June 25, 1943, is $1,025.00 and all I found out was the court did not have jurisdiction. I could of found that out without any attorneys just as well, all I had to do was wait for the decision.

Yours truly,

Signed, G. F. Howard, *Plaintiff*,
10/23/44. Oberlin, Kansas.

Miss Mullen replied Oct. 24, "We are returning all papers for the reason that we can not consistently certify to these matters without a specific order of court directing us to do so.

G. F. Howard.

State of Kansas, County of Decatur, ss.

G. F. Howard, appellant in Cause No. 12934, being duly sworn, deposes and says that the statements regarding the handling of the case above are correct.

Subscribed and sworn to before me, a county clerk within and for the County of Decatur, State of Kansas, Dec. 28, 1944.

John Locy,
(Seal) By Dorothy Ater, Deputy.

My Comm. expires Jan. 13, 1947.

I was in Mr. M. L. Donovan's office two or three times during the fore part of August, 1944, and I heard Mr. Donovan threaten to sue my husband, Mr. Howard, if he did not let he (Donovan) and Mullen proceed with the case. My husband, Mr. Howard, was insisting Donovan and Mullen withdraw from the case, as Donovan had stated that his brief would show that the Decatur County Court (Kansas) did have jurisdiction in October, 1936.

Minnie R. Howard.